Supreme Court, U.S.
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No. 93-712

In The

Supreme Court of the United States

October Term, 1993

RAFAEL SANCHEZ and LUIS SANCHEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether raising the issue of privity in Petitioners' collateral estoppel claim is proper, when the United States government and its territory of Puerto Rico are not dual sovereigns?

PARTIES TO THE PROCEEDINGS

Petitioners:

Rafael Sanchez
Luis Sanchez

Respondent:

United States of America

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION OF THE COURT BELOW	2
JURISDICTION	2
ARGUMENT	2
RAISING THE ISSUE OF PRIVITY, IN PETITIONERS' COLLATERAL ESTOPPEL CLAIM, IS NOT PROPER BECAUSE THE UNITED STATES AND THE TERRITORY OF PUERTO RICO ARE NOT DUAL SOVEREIGNS	2
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Ashe v. Swenson,
397 U.S. 436 (1970) 3, 7

Bartkus v. Illinois,
359 U.S. 121 (1959) 3, 4, 5

Domenech v. National City Bank,
294 U.S. 199 (1935) 4

Heath v. Alabama,
474 U.S. 97 (1985) 3

Montana v. United States,
440 U.S. 147 (1979) 3

United States v. Bonilla Romero,
836 F.2d 39 (1st Cir. 1970) 3

United States v. Dixon,
113 S.Ct 2849 (1993) 6

United States v. Lopez Andino,
831 F.2d 1164 (1st Cir. 1987) 3

United States v. Perchitti,
955 F.2d 674 (11th Cir. 1992) 3

United States v. Sanchez,
992 F.2d 1143 (11th Cir. 1993) 3, 4

United States v. Wheeler,
435 U.S. 313 (1978) 4

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The Petitioners, RAFAEL SANCHEZ and LUIS SANCHEZ, by their undersigned counsel, respectfully pray that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on June 4, 1993 and September 30, 1993. Because arguments regarding privity and dual sovereignty were first raised in Respondent's Brief in Opposition, Petitioners file this reply.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals, as amended, is reported at 3 F.3d 366. The initial opinion of that court is reported at 992 F.2d 1143. The opinion of the District Court for the Southern District of Florida is reported at 741 F. Supp. 215.

JURISDICTION

Title 28 United States Code, Section 1254(1) provides this Court's jurisdiction. The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 4, 1993. Petitioners' timely motion for rehearing and suggestion of rehearing en banc was denied in a per curiam order dated September 30, 1993. This petition is filed pursuant to Rule 20, Rules of the Supreme Court, as amended.

ARGUMENT

RAISING THE ISSUE OF PRIVITY, IN PETITIONERS' COLLATERAL ESTOPPEL CLAIM, IS NOT PROPER BECAUSE THE UNITED STATES AND THE TERRITORY OF PUERTO RICO ARE NOT DUAL SOVEREIGNS.

The Respondent asks this court to deny the Petitioners' request for relief because the privity component of the collateral estoppel doctrine of the Double Jeopardy Clause has not been established. Indeed, in both a criminal prosecution and a civil proceeding, collateral estoppel does require that a party, who is to be precluded from

relitigating an issue decided in a previous litigation, was either a party or in privity with a party to that litigation. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979).

However, in a criminal context, raising the issue of privity only becomes necessary if the parties to the actions are dual sovereigns. *See United States v. Perchitti*, 955 F.2d 674, 676 (11th Cir. 1992) (discussing issues of collateral estoppel between multiple sovereigns and finding no privity between Florida and the United States); *United States v. Bonilla Romero*, 836 F.2d 39, 43 (1st Cir. 1970) (finding no privity between dual sovereigns)[1]. *But see Ashe v. Swenson*, 397 U.S. 436 (1970) (no mention of privity in collateral estoppel analysis in subsequent prosecutions by same sovereign). This Court, in *Bartkus v. Illinois*, 359 U.S. 121, 123-4 (1959), clearly expressed its reasons for examining the element of privity in cases involving dual sovereigns. The *Bartkus* court reviewed a state prosecution which followed a federal prosecution based upon the same conduct. Justice Frankfurter indicated in *Bartkus* that a second prosecution may be barred where one prosecuting sovereign can be said to be acting as a "tool" of the other, or where the second prosecution

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[1] It is important to note that the First Circuit Court has held that, for the limited purposes the Double Jeopardy Clause, and despite Puerto Rico's constitutional status as a territory, it is a separate sovereign. *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir. 1987). Such reasoning is in conflict with the Eleventh Circuit's decision in this case that Puerto Rico is still constitutionally a territory, and not a separate sovereign. *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993). *See also United States v. Wheeler*, 435 U.S. 313 (1978); *Heath v. Alabama*, 474 U.S. 97 (1985).

amounts to a "sham and cover" for the first. *Id.* Unlike *Bartkus*, however, this case deals only with a single sovereign, not two separate prosecuting entities.

Accordingly, for purposes of a double jeopardy analysis, where the courts find that there is no dual sovereignty, the governmental entity which prosecutes a second time is by necessity the same as in the first prosecution. Moreover, this Court has held that "when a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a state, but as '**an agency for the federal government**.' " *United States v. Wheeler*, 435 U.S. 313, 321 (1978) (quoting *Domenech v. National City Bank*, 294 U.S. 199, 204-205 (1935)).

Here, the Eleventh Circuit found that the United States and Puerto Rico are not separate sovereigns for purposes of double jeopardy. *United States v. Sanchez*, 992 F.2d 1143, 1150-52 (11th Cir. 1993). Because the Eleventh Circuit held that Puerto Rico was "still constitutionally a territory, and not a separate sovereign," privity between the parties necessarily and logically flows from the court's holding. *Id.* at 1151. Once the Eleventh Circuit decided that there is no issue of dual sovereignty, no further inquiry is necessary as to the privity between the parties. Yet, the Respondent has convoluted the Petitioners' collateral estoppel claim by interjecting a dual sovereignty argument into their discussion, based upon First Circuit case law. Respondent's Brf. at 12-15. They suggest that the "First Circuit, which holds that Puerto Rico and the United States are separate sovereigns for double jeopardy purposes, would have reached the same result as the Eleventh Circuit in this case by finding no

double jeopardy issue to be presented at all." Respondent's Brf. at 14. The Respondent then makes a leap to the conclusion that if:

> [t]he First Circuit were correct that the United States and Puerto Rico are separate sovereigns for Double Jeopardy purposes, it would follow that (at least absent extraordinary circumstances in which one sovereign is acting as a "sham and cover" for the other) . . . an offense against the United States would never be "the same offense" as an offense committed against Puerto Rico. It would also follow that the United States and Puerto Rico are not "in privity" for purposes of application for the collateral estoppel doctrine.

Id. (citing *Bartkus v. Illinois*, 359 U.S. 121, 123-24 (1959)). Because the Eleventh Circuit favorably decided for the Petitioners that Puerto Rico and the United States government are not separate sovereigns, thereby invalidating the necessity for privity, the Respondent's lengthy argument concerning the separate sovereignty of Puerto Rico is misplaced and only serves to cloud the issues for this Court to grant certiorari.

The issue to be decided in this case, for the Petitioners' collateral estoppel claim to be valid, is not whether the United States and Puerto Rico are in privity, but whether the Eleventh Circuit erred by not addressing their collateral estoppel claim at all. The Respondent has conceded that the Eleventh Circuit did not "expressly" address the Petitioners' collateral estoppel claims, but offers nothing more than conjecture as to why the

Eleventh Circuit failed in this respect. Respondent's Brf. at 8. They state:

> the court's silence **may have been** the result of a determination that petitioners failed to carry their burden . . . the acquittals in Puerto Rico **could have** decided issues of fact relevant to none, some, or all of the federal charges.

Id. (emphasis added). While it may be expedient for the Respondent's argument to offer such suggestions for this omission, the fact remains that the Eleventh Circuit failed to apply settled principles of constitutional law, as enunciated in *Ashe* and recently reaffirmed in *United States v. Dixon*, 113 S.Ct 2849 (1993), relating to the Petitioners' collateral estoppel claims. Thus, the Eleventh Circuit, whether by error or oversight, is in direct conflict with this Court's past and recent decisions on the Double Jeopardy Clause of the Fifth Amendment.

Additionally, the Petitioners find it somewhat puzzling that the Respondent has stated, '[t]his case is not an appropriate vehicle to address the conflict between the Eleventh Circuit and the First Circuit . . . [and] does not squarely present the question [of] whether the dual sovereignty doctrine applies to successive prosecutions by Puerto Rico and the United States" [Respondent's Brf. at 14], yet base their privity argument upon the notion that the United States and Puerto Rico are separate sovereigns, according to the First Circuit, and are therefore not in privity. *Id.* What the Respondent asks this Court to conclude is that the dual sovereignty issue, and the conflict between the First and Eleventh Circuits, should not be addressed, but that there is dual sovereignty between the United States and Puerto Rico and, therefore, no

privity exists between the two parties. The Petitioners find this argument confusing at best.

CONCLUSION

This case is ripe for this Court to grant certiorari. First, the Eleventh Circuit failed to apply constitutional standards of collateral estoppel which were directly raised by the Petitioners in their appeal to that court. Consequently, the decision of the Eleventh Circuit was in direct and true conflict with this Court's decisions in *Ashe*, and most recently in *Dixon*. Second, in accepting review, this Court can also resolve the direct conflict between the First and Eleventh Circuits concerning the status of Puerto Rico, vis-a-vis the United States government, for purposes of double jeopardy analysis. By doing so, this Court will prevent diametrically opposed results from occurring in the future, when both the First and Eleventh Circuits confront double jeopardy claims.

Respectfully submitted,

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